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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-240

JOHN R. BRIGHT, CHARLES A. WILLIAMS, EDWARD J. O'CONNELL, on behalf of themselves and others similarly situated and too numerous to mention,
Petitioners,

vs.

MELVIN LAIRD, as U. S. Secretary of Defense; ROBERT SEAMENS, as U. S. Secretary of the Air Force; MAJOR GENERAL ROBERT W. BURNS, as Commanding General; FOURTH AIR FORCE, HAMILTON AIR FORCE BASE, CALIFORNIA; COLONEL MICHAEL J. STUBLAREC, Base Commander, Hamilton Air Force Base, California; MAJOR DONALD H. TIDWELL, Commander 78th Security Police Squadron, Hamilton Air Force Base, California; CAPT. PAUL D. NORRIS, JR., Confinement Officer, 78th Security Police Squadron, Hamilton Air Force Base, California,
Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI
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for the Ninth Circuit

Petitioners John R. Bright, Charles A. Williams, and Edward J. O'Connell, and the class they represent, pray that a writ of certiorari issue to review the

opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 20, 1971.

OPINIONS BELOW

The opinion of the court below is reported *sub nom. Locks v. Laird,* 441 F.2d 479 (9 Cir. 1971) and is reproduced as Appendix A herein. The decision of the District Court is reported *sub nom. Locks v. Laird,* 300 F.Supp. 915 (N.D. Cal. 1969) and is reproduced as Appendix B herein.

JURISDICTION

The opinion and judgment of the court below were entered on April 20, 1971, affirming the decision of the United States District Court for the Northern District of California denying petitioners relief. By order entered on July 20, 1971, Mr. Justice Douglas extended petitioners' time in which to file a petition for writ of certiorari to and including August 17, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a military regulation which facially affronts the First Amendment may be challenged in federal court or whether such a regulation may only

be challenged, after violation, as a defense in courts-martial proceedings?

2. Whether a military regulation which prohibits the wearing of the uniform when expressing disapproval of the employment of United States troops while permitting the wearing of the uniform when expressing approval of the employment of United States troops, violates the First Amendment?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

General Order of October 1968 of Secretary of the Air Force Harold S. Brown:

> "Recent developments have established a need for clarification of the circumstances in which Air Force members are not permitted to wear their uniform. Accordingly, pursuant to para 1-10d, AFM 35-10, 26 June 1968, the Secretary of the Air Force has specified that Air Force members will not wear the uniform at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting, demonstration, or interview is the advocacy, expression, or approval of opposition to the employment or use of the Armed Forces of the United States."

Article 92, Uniform Code of Military Justice, 10 U.S.C. §892:

"Any person subject to this chapter who——

(1) violates or fails to obey any lawful general order or regulation;

. . . .

shall be punished as a court-martial may direct."

STATEMENT OF THE CASE

In October of 1968, then Secretary of the Air Force Harold S. Brown issued a general order (referred to hereafter as: "the challenged regulation") which reads:

> "Recent developments have established a need for clarification of the circumstances in which Air Force members are not permitted to wear their uniform. Accordingly, pursuant to para 1-10d, AFM 35-10, 26 June 1968, the Secretary of the Air Force has specified that *Air Force members will not wear the uniform at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting, demonstration, or interview is the advocacy, expression, or approval of opposition to the employment or use of the Armed Forces of the United States.*" (emphasis added) (C.T. 4, 90)

On February 8, 1969, Airman Michael Locks[1] was convicted of violating Article 92 of the Uniform Code

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[1]Locks was the lead plaintiff in the District Court and lead appellant in the Court of Appeals. He does not, however, participate in this petition for writ of certiorari.

of Military Justice for failing to obey the above-mentioned allegedly lawful order of Secretary Brown by participating, in uniform, in a public meeting which expressed approval of opposition to the employment of the Armed Forces of the United States in Southeast Asia. The public meeting was alleged to have occurred in San Francisco, California, on October 12, 1968. The specification also charged Locks with violating Secretary Brown's order "by wearing his uniform while participating in a public televised interview in which he knew his purpose to be expression of opposition to employment of United States Armed Forces in Southeast Asia, and which opposition he expressed." Locks, as a consequence of the conviction, was sentenced to a year at hard labor and forfeiture of pay and allowances. (C.T. 3-4, 10).

Petitioners Bright, Williams, O'Connell and the class they represent, like Locks, are members of the United States Air Force Reserve, serving on extended active duty at Hamilton Air Force Base, California, in the 349th Military Airlift Wing. (C.T. 2). Unlike Locks, they were not court-martialed and convicted for violating the challenged regulation. They had planned on participating in uniform, with Locks, in the peaceful public meeting held in San Francisco in October of 1968 but were deterred from doing so by the challenged regulation. They also wished to participate in a peaceful demonstration, in uniform, scheduled for May 30, 1969, in the City of San Francisco but, because of the challenged regulation and the example of the punishment suffered by Locks,

were afraid to do so. (C.T. 5). Accordingly, they and Locks brought this suit, filed April 2, 1969 for injunctive relief, declaratory relief, relief in mandamus and relief in habeas corpus. (C.T. 1). Petitioners and Locks alleged that the amount in controversy exceeded $10,000 and invoked the District Court's jurisdiction pursuant to 28 U.S.C. §§1331, 1361, 2201, 2202, 2241, 2242 and 2243, and 5 U.S.C. §702. (C.T. 2).

After issuing an Order to Show Cause (C.T. 24-25), considering the legal memoranda filed by petitioners and respondents and after hearing oral argument, the Honorable Alfonso J. Zirpoli, District Court Judge, took the matter under submission for decision, a decision which he rendered on May 23, 1969. (C.T. 90). Judge Zirpoli held that he was without jurisdiction to consider the complaint of Locks (C.T. 92) but that he did have jurisdiction to consider the complaint of petitioners (C.T. 93, 100-101). Judge Zirpoli dismissed the complaint and denied the petition of plaintiffs other than Locks, holding the challenged regulation constitutional. (C.T. 90:102).

On Appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment denying the petition, one Judge dissenting.[2] The majority did not reach the question whether the challenged regulation is unconstitutional, holding rather that federal courts should not entertain challenges to a military

[illegible] Hufstedler's opinion below is denominated "concurring and dissenting" but she concurred only in that portion of the decision denying relief to Locks. Since Locks is not participating in the petition to this Court, Judge Hufstedler's opinion is properly characterized as a dissent.

regulation of penal character that may also be challenged in defense to a criminal prosecution. The majority relied upon the ruling of this Court in *Younger v. Harris,* 401 U.S. 37 (1971). Appendix A, p. iv.

REASONS FOR GRANTING THE WRIT

Petitioners challenge a federal military regulation, that, to them (and to the only Judge below who reached the merits), is a blatant infringement of the First Amendment. Essentially, the regulation makes it a punishable offense, while wearing the uniform, to express disapproval of the employment of the Armed Forces of the United States, no matter where or how those troops might be used. On the other hand, one may wear the uniform when endorsing the unrestricted employment of the Armed Forces of the United States. The regulation affronts the general rule interdicting governmental prescription of orthodox opinion, *West Virginia Board of Education v. Barnette,* 319 U.S. 624 642 (1943); its unconstitutionality seems squarely settled by this Court's decision in *Schacht v. United States,* 398 U.S. 58 (1970). Indeed, after *Schacht,* is is difficult to conceive of an argument that might be fashioned in support of the challenged regulation. Moreover, petitioners unquestionably have standing to challenge the regulation for there is no question that should they, in the face of the regulation, exercise their First Amendment rights, they shall be punished and likely incarcerated.

In spite of all this, petitioners have been denied relief. They have been told that the federal courts will not provide a forum for the vindication of their First Amendment rights. The United States Court of Appeals justified this surprising result with an unexplained citation to decisions rendered last term by this Court refining the doctrine of federal abstention where proceedings are underway in state courts.[3]

The abstention decisions were found dispositive although this case is nothing like them. For example:

1) No criminal action, quasi-criminal action or action of any sort is pending against petitioners in any other court where the challenged regulation is in issue; consequently, granting relief to petitioners would not encumber the judicial processes of any other jurisdiction;

2) Petitioners challenge no law of an interdependent sovereignty but a federal rule adopted by the executive branch;

3) Their challenge has been brought in the only forum conceivably available to them unless they are willing to engage in civil disobedience, notoriously flaunt the regulation, and spend a year or so in the stockade;

4) Petitioners challenge a regulation which, because blatantly unconstitutional (it enacts precisely what the Constitution forbids), is not susceptible to a saving gloss;

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[3]The cases relied upon in the Court below were *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Mackell*, 401 U.S. 66 (1971).

5) There are no effective remedies for petitioner to exhaust, the Air Force provides no means for a challenge to its regulations other than by means of a defense at court-martial. In effect, the Court below has informed petitioners that they may exercise their First Amendment rights only if they are willing to violate a penal regulation, suffer incarceration for at least a year, and, consequently, jeopardize their military career and whatever career they may wish to pursue in civilian life. In short, they are being told that they are entitled to the protections of the First Amendment only if they are uncommonly courageous or inordinately foolish.

And more is at stake here than the First Amendment rights of petitioners. The regulation they challenge restricts the free expression of well over 1,000,000 persons.[4] Under the decision below, those 1,000,000, and millions of their brethren in the other branches of the Armed Forces, are deprived of any effective forum for the vindication of First Amendment claims, no matter how transparently unconstitutional the regulations by which they must abide may be.

The magnitude of the constitutional and jurisdictional questions posed, as well as the sheer number of lives affected, mark this case one eminently appropriate for the exercise of this Court's certiorari jurisdiction.

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[4]In 1969, when this litigation began, Air Force personnel, other than civilian personnel, totaled 1,360,000. *Questions and Answers About the United States Air Force,* Department of Defense, Secretary of the Air Force, Office of Information (1969).

I.

THE FEDERAL COURTS HAVE, AND SHOULD EXERCISE, JURISDICTION OVER PETITIONERS' CHALLENGE TO A FACIALLY UNCONSTITUTIONAL FEDERAL REGULATION

The suppressed premise of the Court of Appeal's opinion denying relief to petitioners is that the doctrine of abstention, applied where state statutes are facially challenged, is identically applied when federal regulations are in issue. The Court of Appeals, we respectfully urge, is mistaken for two reasons:

A) Even were the doctrine of abstention identically applicable where a federal regulation is in issue, petitioners would, nevertheless, be entitled to relief since they challenge a facially unconstitutional regulation and since criminal proceedings against them are not underway.

B) The doctrine of abstention is not applicable where a federal regulation is in issue; rather, long-standing authorities establish that petitioners are entitled to challenge the Air Force regulation in Federal Court without subjecting themselves to the hazards of a court-martial.

A. Even were the doctrine of abstention identically applicable where a federal regulation is in issue, petitioners would, nevertheless, be entitled to relief since they challenge a facially unconstitutional regulation and since criminal proceedings against them are not underway.

In order to make this point, let us suppose the petitioners' attack a state penal statute (one, say, that prohibited the use of National Guard uniforms in theatrical performances casting aspersion on the National Guard) pursuant to 42 U.S.C. §1983. If that

were the case, the controlling authority would not be *Younger v. Harris, supra,* but *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). *Younger,* and its companion cases, announce a rule prohibiting the enjoining by federal courts of criminal proceedings *then in progress* under the challenged state statutes.[5] When proceedings are already underway questions of judicial economy as well as comity between sovereignties abjure the federal courts to stay their hand. There is no reason to suppose that federal judges will necessarily be more sensitive to constitutional issues than will state judges and the state judges have the ability, not shared with the federal courts, of responding to a constitutional attack by grafting upon the challenged statute a saving gloss which eliminates the constitutional infirmity while preserving those aspects of the statute which advance a legitimate state interest.

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[5]See, especially, the concurring opinions of Justices Stewart and Harlan in *Younger v. Harris,* 401 U.S. 37, 55 (1971): ". . . the Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions." *Younger's* other companions are *Samuels v. Mackell,* 401 U.S. 66 (1971); *Perez v. Ledesma,* 401 U.S. 82 (1971), *Dyson v. Stein,* 401 U.S. 200 (1971); *Byrne v. Karalexis,* 401 U.S. 216 (1971). *Boyle v. Landry,* 401 U.S. 77 (1971) might also be deemed a *Younger* companion but it is a horse of a different color. It is a standing case. In *Boyle* no state prosecution was underway but plaintiffs were in no demonstrable danger of being prosecuted under the challenged statutes for constitutionally protected activities. Instead they had merely ". . . made a search of state statutes . . . with a view to picking out certain ones that . . . might possibly be used . . . against them." 401 U.S. 81. Petitioners here, unlike the *Boyle* plaintiffs, have brought no hypothetical suit. The activity in which they propose to engage is constitutionally protected, it is violative of the regulation, the Air Force fully intends to prosecute them and has presented them with Locks as a recent example of what will happen if they exercise their rights.

But where criminal proceedings have not been undertaken, and the challenged statute is, by its terms, not susceptible to a saving gloss, *Younger* is inapposite and abstention inappropriate. For, in such a situation:

> ". . . the naked question, uncomplicated by an unresolved state law, is whether that Act on its face is unconstitutional . . . abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal courts should not abstain but proceed to decide the federal constitutional claim."
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> *Wisconsin v. Constantineau, supra,* 400 U.S. at 439.[6]

That describes this case exactly. The challenged regulation is blatantly unconstitutional.[7] No criminal proceedings are underway.[8] Abstention is inappropriate.

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[6]See also *Zwickler v. Koota,* 389 U.S. 241 (1967) holding abstention improper where plaintiff challenged a state penal statute for overbreadth.

[7]The unconstitutionality of the regulation is so evident that it could be urged that abstention would be inappropriate even if criminal proceedings were in progress. See *Younger v. Harris,* 401 U.S. at 53-54.

[8]Indeed, since no prosecution is underway and no state proceedings would be encumbered by the exercise of federal jurisdiction, abstention would serve no purpose but that of requiring exhaustion of state remedies. Resort to other remedies, of course, is not a prerequisite to the exercise of federal jurisdiction pursuant to 42 U.S.C. §1983. *Damico v. California,* 389 U.S. 416 (1967); *McNeese v. Board of Education,* 373 U.S. 668, 671 (1963); *Monroe v. Pape,* 365 U.S. 167, 180-183 (1961). See also *Houghton v. Shafer,* 392 U.S. 639, 640 (1968) (exhaustion held a uniquely burdensome requirement when it "demand[s] a futile act.")

B. The doctrine of abstention is not applicable where a federal regulation is in issue; rather, long-standing authorities establish that petitioners are entitled to challenge the Air Force regulation in Federal Court without subjecting themselves to the hazards of a court-martial.

In *Younger v. Harris* this Court stressed the principles of federalism and the necessity of preserving the autonomy of state courts and legislatures.

Those considerations have no place or parallel in this case.

We are not here concerned with a sovereign state but a federal agency. And where the constitutionality of the regulations of a federal agency are in issue, the rule is that a person affected by the regulations need not hazard jail as the price for challenging them.

For example, in *Oestereich v. Selective Service Board No. 11,* 393 U.S. 233 (1968), the petitioner, a dully enrolled theological student, was classified I-A, rather than IV-D (draft exempt) when he returned his registration certificate to the government. The Selective Service regulation which produced this result was inconsistent with the act of Congress which provided the exemption for theological students. Oestereich sought pre-induction judicial review of the lawfulness of the regulation. The government contended that such a remedy was unavailable by virtue of §10(b)(3) of the Military Selective Service Act of 1967. §10(b)(3) provides that there shall be no pre-induction judicial review "of the classification or processing of any registrant" judicial review being limited to defense in a criminal prosecution.

This Court declined to hold §10(b)(3) a bar to Oestereich's suit:

> "To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the act with unnecessary harshness." 393 U.S. at 238.

And see, *Breen v. Selective Service Board,* 396 U.S. 460, 467-468 (1970).[9]

Oestereich has antecedents stretching back to the beginning of the century. *Ex parte Young,* 209 U.S. 123 (1908), and *Oklahoma Operating Company v. Love,* 252 U.S. 331 (1920), both stand for the proposition that judicial review must be available at a stage earlier than a defense to a criminal prosecution where the penalty for violating the regulation is so great as to deter challenge to the validity of agency action. *Young* held that the Fourteenth Amendment's guarantee of due process required judicial review by civil suit where a State legislative scheme provided that

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[9]In *Oestereich* and *Breen* Justice Harlan read the majority decisions as providing relief for criminal prosecution when it appeared certain the registrant would win on the merits. He proposed, as an alternative rationale for the same result in the cases before the court, that pre-induction review should be available only when the legal challenge does not require the court to review factual or discretionary decisions of the agency. 393 U.S. at 239-244; 396 U.S. at 468-469. Under either theory, petitioners here are entitled to judicial review without risking a criminal prosecution. In the wake of *Schacht v. United States, supra,* they appear certain to win on the merits and the issue they pose is exclusively a legal one, requiring no court to pass on factual or discretionary decisions of the federal agency.

the only way to challenge administrative rate-setting was to violate the prescribed rates and become subject to penalties up to five years in jail and a $5,000 fine. This Court recoiled at that deterrent to judicial review:

> "The necessary effect and result of such legislation must be to preclude a resort to the courts . . . for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing . . .
>
> * * * * *
>
> "A law which indirectly accomplishes a like result [making administrative orders conclusive] by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 146, 147.

This Court held that the remedy at law was so uncertain and hazardous as to require federal equity to intervene and protect constitutional rights.

The *Love* decision carried this theory of judicial review one step further. It held that, faced with a legislative scheme similar to that in *Young,* which only allowed judicial review of administrative orders by way of defense to contempt proceedings, a federal equity court could enjoin enforcement of the orders and the imposition of fines. Mr. Justice Brandeis held that the right to judicial review could not be made contingent upon the risk of such penalties:

> "Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the act relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of these rates." 252 U.S. at 337.

In the same vein, but of more recent vintage, are *Shaughnessey v. Pedreiro,* 349 U.S. 48 (1955), and *Rusk v. Cort,* 369 U.S. 367 (1962).

In *Shaughnessey v. Pedreiro,* the question before the Court was whether a deportation order under the Immigration and Nationality Act of 1952, in face of a provision that such orders shall be "final," could be reviewed in an action for declaratory relief under §10 of the Administrative Procedure Act. It had been held in *Heikkila v. Barber,* 345 U.S. 229 (1953), that review in deportation cases under the Immigration Act of 1917 was confined to habeas corpus. The Court rejected the *Heikkila* holding on the ground that "it would certainly not be in keeping with either of these Acts to require a person ordered deported

to go to jail in order to obtain review by a court." 349 U.S. at 51. This holding was extended to exclusion orders in *Brownell v. Tom We Shung,* 352 U.S. 180 (1956), on the ground that in a declaratory judgment action "the odium of arrest and detention is not present." 352 U.S. at 183.

In *Rusk v. Cort,* 369 U.S. 367 (1962), appellee had ostensibly been expatriated under §349(a)(10) of the Immigration and Nationality Act of 1952 for having evaded service in the armed forces. Cort, who was living abroad, instituted an action in the District of Colombia for declaratory and injunctive relief challenging the constitutionality of §349(a)(10). The government claimed that review was limited by §360(b) and (c) of the Act which required that claimants living abroad secure a determination of their citizenship "in habeas corpus proceedings and not otherwise." The Court rejected the contention because it concluded that Congress did not intend "that a native of this country living abroad must travel thousands of miles, be arrested and go to jail in order to attack an administrative finding . . ." 369 U.S. at 375.[10]

The rule favoring judicial review of agency action where the only alternative is defense to a criminal prosecution, then, is one of long-standing which has been recently reaffirmed. Petitioners' case appears to meet all the prerequisites. Unless the federal courts are available to them they will be unable to challenge

[10]See also *Abbott Laboratories v. Gardner,* 387 U.S. 136, 151-154 (1967); *Wolff v. Selective Service,* 372 F.2d 817 (2 Cir. 1967).

the Air Force regulation except as a defense to a criminal prosecution. The Air Force provides no mechanism of a declaratory nature by which petitioners might challenge the regulation.[11]

Indeed, it is fair to say, that if ever there was a case in which the principle of judicial review consistently adhered to from *Ex Parte Young* through *Oestereich* should be enforced, it is this one. Among the considerations which compel that policy are doubtless the following three:

1) Presenting a person with the choice of foregoing his rights or going to jail is to present him with the sort of dilemma that no "civilized legal system"[12] would pose;

2) Administrative agencies are not generally deemed competent to pass upon constitutional questions. Cf. *Public Utilities Comm'n v. United States,* 355 U.S. 534 (1958); *Engineers Public Service Co. v. S.E.C.,* 138 F.2d 936, 952-953 (1943), dismissed as moot, 332 U.S. 788. Requiring one to resort to such an agency for the vindication of his rights is to require a futile act. Cf. *Houghton v. Shafer,* 392 U.S. 639 (1968). Accordingly, this Court, in *Noyd v.*

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[11]In *Reisman v. Caplin,* 375 U.S. 440 (1964), a case involving attempts to resist a subpoena under the Internal Revenue laws, the Court discussed *Young* and *Love* and concluded that the legislative scheme under review was sufficiently free from burdens: "Finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity we remit the parties to the comprehensive procedure of the Code *which provides full opportunity for judicial review before any coercive sanctions may be imposed.*" (Emphasis added.) 375 U.S. at 450.

[12]E. Borchard, Hearings on H.R. 5623, Before Subcommittee of the Senate Committee on the Judiciary, 70th Congress, 1st Sess., pp. 75-6 (1928).

Bond, 395 U.S. 683 (1969), observed that it is especially unfair to require exhaustion of military remedies when petitioners raise meritorious arguments "denying the right of the military to try them at all." (p. 696, fn. 8);

3) Law-breaking and civil disobedience should be avoided whenever possible. Citizens, when they question the authority of government to control certain aspects of their life, should be encouraged to bring their controversy to Court instead of resorting to confrontation politics. A society of civility is threatened by unnecessary confrontations.

As to the first point, the dilemma presented to petitioners if they are not permitted to invoke the jurisdiction of the federal courts is singularly cruel. In order to engage in free expression without the restriction of the unconstitutional regulation, they will likely have to spend, as did their colleague Locks, a year in confinement. Additionally, any military career which they may wish to pursue will be destroyed and their chances for success in the civilian world will be greatly diminished because of their tarnished military records. The sanction to be imposed should they violate the regulation is of such enormity as virtually to isolate the regulation from constitutional attack. Cf. *Ex Parte Young, supra,* 209 U.S. at 146. The "chilling effect" on free expression produced by such a system approaches absolute zero.

On the second point, of all the administrative agencies which one might list as inappropriate for considering a constitutional challenge, military agencies

come most readily to mind. As this Court has previously observed: "Courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *O'Callahan v. Parker,* 395 U.S. 258 (1969). See also *Toth v. Quarles,* 350 U.S. 11, 17-18 (1955); *Reid v. Covert,* 354 U.S. 1, 35-38 (1957). The inevitable influence that the regulation-promulgator has over the military judiciary, *O'Callahan v. Parker, supra,* 395 U.S. at 264, makes the possibility of a declaration of unconstitutionality so remote as to be nearly nil.[13] That is the necessary consequence of a system which, after all, is not designed to provide justice but to instill discipline. See *id.* at 266. Requiring petitioners to expose themselves to a criminal trial in order to exercise their free speech rights would be unconscionable in any case. To relegate them to a courts-martial remedy is to give them no remedy at all.

Thirdly, the fundamental purpose of military law will be subverted if petitioners are directed exclusively to a courts-martial remedy. Military law exists to promote discipline; it is hard to imagine a policy more destructive of discipline than one requiring servicemen to violate a regulation in order to challenge it. Constitutional challenge by confrontation should be avoided whenever possible in these turbulent times; it should not be encouraged in the military where discipline and civility are essential to good order and the duty to obey questionable orders con-

[13]We are familiar with no case in which a military court has held the regulations of its Secretary unconstitutional.

tinues to be the knottiest of legal and ethical questions.

II.

THE CHALLENGED REGULATION CONFLICTS WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The regulation challenged by petitioners provides:

> "Recent developments have established a need for clarification of the circumstances in which Air Force members are not permitted to wear their uniform. Accordingly, pursuant to para 1-10d, AMF 35-10, 26 June 1968, the Secretary of the Air Force has specified that *Air Force members will not wear the uniform at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting, demonstration, or interview is the advocacy, expression, or approval of opposition to the employment of use of the Armed Forces of the United States.*" (emphasis added) (C.T. 4)

The regulation, it should be emphasized, does not prohibit the wearing of uniforms to *all* public meetings where the employment of the Armed Forces of the United States is a topic of discussion. The regulation only prohibits the wearing of the uniform to meetings where persons will express the "wrong" ideas. It is heretical meetings, not all meetings, which are disapproved.

Now it is the most elementary principle of constitutional law that it is not within the power of any branch of government, much less the military, to define heresy. As this Court said in *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943):

> "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

No official, we take it, means *no* official. And even if we were to search for some exception to that unambiguous pronouncement, the last official, high or petty, that we would expect to have authority to promulgate public dogma would be a military authority. The founding fathers, aware that a strong military force was always a potential threat to the liberties contained in our basic charter, created a military establishment that is supposed to be civilian-controlled and politically neutral. When James Madison, author of the First Amendment, observed that the "censorial power is the people over the government and not in the government over the people," see *New York Times Co. v. Sullivan,* 376 U.S. 254, 275 (1964), he did not inadvertently omit an exception for the military; elsewhere he had written:

> "Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On any scale it is an object of laudible circumspection and precaution. A wise nation will combine

> all these considerations; and, whilst it does not rashly preclude itself from any resources which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties."
>
> *The Federalist,* No. 41, Modern Library Edition, p. 259, 262-263.[14]

Squarely in point is *Schacht v. United States,* 398 U.S. 58 (1970), where this Court held a clause of 10 U.S.C. §772(f) unconstitutional. §772(f) permitted the wearing of the uniform of the armed forces in a theatrical production on the condition that "the portrayal does not tend to discredit that armed force." This Court unanimously struck down the condition:

> "In light of our earlier finding that the skit in which Schacht participated was a 'theatrical production' within the meaning of §772(f), it follows that his conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of §772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment. To preserve the constitutionality of §772(f) that final clause must be stricken from the section." *Id.* at 48-49.

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[14]And see, *The Federalist,* No. 8 (Hamilton), No. 24 (Hamilton) and No. 29 (Hamilton).

Schacht holds that once the government permits the uniform to be used to promote one set of ideas it cannot interdict its use for the support of competing ideas without running afoul of the First Amendment. The challenged regulation enacts precisely what *Schacht* reprobates.

Under present military regulations United States Army Major James N. Rowe, dressed in uniform, and with the endorsement of General Westmoreland, dashes from media appearance to meetings questioning the loyalty and patriotism of United States Senators McGovern, Fullbright and Mansfield.[15] Petitioners, on the other hand, may not wear their uniforms to meetings addressed by those same Senators. There are nations in which this turn of events would not be surprising, but our nation, with its guarantee of free expression and its civilian control of the military, is not one of them.

If the military wishes to prohibit the wearing of uniforms to all political meetings that may perhaps be justified as a continuation of its role of political neutrality. But the military may not choose the "proper" political forum for the wearing of uniforms. What Justice Jackson said in *Barnette* is at least equally relevant here:

> "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program . . . [military] officials shall com-

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[15]For one of many accounts of Major Rowe's exploits see the *San Francisco Chronicle*, Monday, November 24, 1969, at page 13.

> pel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity . . . the Inquisition . . . the Siberian exiles . . . down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves eliminating dissenters.
>
> "It seems trite but necessary to say that the First Amendment . . . was designed to avoid these ends by avoiding these beginnings."
>
> *Id.* at 641.[16]

So long as military personnel have the right to read, think, converse, write, communicate with their governmental representatives, vote—and it is clear that at least some of these are rights presently secured to them by statutory, if not by constitutional authority, see, e.g., 10 U.S.C. §1034—it is as constitutionally incongruous and impermissible for any official to dictate the content of what may be communicated as it would be to dictate the marking of a ballot.

> "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that con-

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[16]If the military can prescribe political orthodoxy it can adopt the following regulation: "The uniform shall not be worn to Democratic Party conventions." If the Democrats should again control the executive they could change the regulation to: "The uniform shall not be worn to Republican Party conventions." And if the military can establish political orthodoxy it can establish religious orthodoxy; exemplary would be a regulation providing "The uniform may be worn to Christian religious services, other than Baptist, and may not be worn off base by Jews for any occasion."

> sent. Authority here is to be controlled by public opinion, not public opinion by authority."
>
> *West Virginia Board of Education v. Barnette, supra,* p. 641.

Since the challenged regulation violates the First Amendment it must be held unconstitutional. In reaching a contrary conclusion[17] the District Court held "Were we at peace and not engaged in 'war' in Southeast Asia, time and circumstances might cause us to seriously question the constitutionality of the regulation under review" (C.T. 96) (footnote omitted) (Appendix B, p. xvi). "War time" (and especially undeclared "war time"), however, cannot serve as a justification for the military's attempt to promote a foreign policy orthodoxy while specifically branding a competing policy as heresy. *Barnette,* after all, was rendered during World War II and *Schacht* during the Vietnam War. Moreover:

> "The phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' . . . 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the

[17]In fairness to Judge Zirpoli we hasten to note that his opinion in the instant case was rendered before the *Schacht* decision.

most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which makes the defense of the Nation worth while."

Robel v. United States, 389 U.S. 258, 263-64 (1967).

CONCLUSION

For the aforementioned reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Dated, August 5, 1971.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 24,682

Michael R. Locks, et al.,
Appellants,
v.
Melvin Laird, Secretary of Defense, et al.,
Appellees.

[April 20, 1971]

Appeal from the United States District Court
for the Northern District of California

Before: Chief Judge CHAMBERS, MURRAH* and HUFSTEDLER, Circuit Judges

MURRAH, Circuit Judge:

Our query is whether members of the military services may attack in the federal civilian courts the constitutionality of service regulations by seeking declaratory and injunctive relief subsequent to the commencement of court-martial proceedings against

*The Honorable Alfred P. Murrah, Senior United States Circuit Judge, Oklahoma City, Oklahoma, sitting by designation.

one of the complainants for violation of the regulation. Affirming the judgment of the trial court, we hold that they may not.

Appellants, members of the Air Force Reserve, attack as violative of their First and Fifth Amendment rights an Air Force regulation prohibiting the wearing of the Air Force uniform ". . . at any public meeting, demonstration, or interview if . . . a purpose of the meeting, demonstration, or interview is the advocacy, expression, or approval of opposition to the employment or use of the Armed Forces of the United States."

Locks has been convicted by a general court-martial for disobeying the regulation and sentenced to reduction to grade of airman basic, forfeiture of all pay and allowances, confinement at hard labor for one year and bad conduct discharge. He has not yet exhausted the remedies available within the military judicial system for review of the court-martial conviction.[1]

Bright, Williams and O'Connell have not been charged with a violation of the challenged regulation. They assert, however, their right to wear their uniforms to meetings which have for their purpose the expression of opposition to the employment or use of the Armed Forces of the United States and that they are deterred from doing so by the certainty of prose-

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[1]The conceded available remedies include review by a Court of Military Review and petition by the accused to the Court of Military Appeals for review. And see *Gusik v. Schilder*, 340 U.S. 128, and *Angle v. Laird*, 429 F.2d 892 (10th Cir.), which equate exhaustion of available military remedies with exhaustion of available state remedies.

cution and punishment (as evidenced by Locks' conviction and sentence) if they do.

The present action, commenced after the initiation of criminal proceedings against Locks, seeks a declaration that the regulation is void on its face, abrogation of Locks' court-martial conviction and injunctive relief against prosecutions for violations of the regulation. Judge Zirpoli dismissed the action as to Locks for failure to exhaust available military judicial remedies and ruled against the other complainants on the merits. We affirm the denial of relief for the reason that in the appropriate exercise of the court's discretion, relief by way of injunction or declaratory judgment should have been denied without consideration of the merits as to any of the parties.

We start with the proposition that the propriety of the relief sought cannot be separated from consideration of its impact on the pending criminal proceedings against Locks. The lawsuit is basically one to enjoin that prosecution. This is so even though three of the complainants are not presently subject to court-martial proceedings. For a declaratory judgment of unconstitutionality would for all practical purposes terminate the criminal case against Locks. In effect, Bright, Williams and O'Connell have joined with Locks in this one lawsuit to deprive the military courts of the jurisdiction plainly conferred on them by statute. We hold that in these circumstances appellants are not entitled to this extraordinary relief.

Appellants invoke, as equally applicable to military prosecutions, the rationale of *Dombrowski v. Pfister,*

380 U.S. 479, involving state prosecutions. And see *Gusik v. Schilder, supra; Noyd v. Bond,* 395 U.S. 683; *Angle v. Laird, supra;* and *Parisi v. Davidson,* 435 F.2d 299 (9th Cir.). *Dombrowski* essentially involved the grant of injunctive relief against state prosecutions for alleged violations of an overbroad and vague statute regulating expression. And appellants read *Dombrowski* to hold that such relief is appropriate whenever the statute or regulation is challenged on its face as violative of the First and Fifth Amendments. But that case must be read in light of its contemporary, *Cameron v. Johnson,* 390 U.S. 611, which characterized *Dombrowski* as presenting a situation "of the 'impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities.'" And *Younger v. Harris,* ..... U.S....., and *Samuels v. Mackell,* .....U.S....., decided since oral argument in this case, leave no doubt that *Dombrowski* is to be confined to its own peculiar facts; "that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it . . ." .....U.S. ..... at ..... The "great and immediate injury prerequisite to the disruption of a pending criminal prosecution must be a "threat to the plaintiff's federally protected rights . . . that cannot be eliminated by his defense of single criminal prosecution." *Younger v. Harris, supra.* See also *Samuels v. Mackell, supra,* applying the same prerequisites to an action for declaratory judgment commenced after the initiation of criminal proceedings against the parties seeking relief.

The record before us is devoid of any showing of the requisite irreparable injury. Nothing more appears than that the military authorities are doing their duty by prosecuting Locks for violation of the regulation. Complainants present only unsupported allegations that the regulation was promulgated in bad faith and that resort to the military judicial system will be futile. This will not sustain a grant of the relief sought.

Judgment affirmed.

HUFSTEDLER, Circuit Judge (concurring and dissenting):

Although I agree with the majority opinion that Locks' failure to exhaust his available remedies within the military justice system deprived the district court of jurisdiction to hear his claim (*Younger v. Harris* (1971) .....U.S.....; *Samuels v. Mackell* (1971) ..... U.S.....), I am unable to concur in the majority's disposition of the appeals of Bright, Williams and O'Connell.

Bright, Williams and O'Connell have no remedies to exhaust within the military justice system. None of them has violated the challenged regulation and none has been subjected to court martial. The military courts have not been given authority to grant declaratory relief or to issue injunctions, except as that authority may be incidental to the Court of Military Appeals' jurisdiction over pending court martials. (*See Gale v. United States*, 17 U.S.C.M.A. 40, 37 C.M.R. 304; *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10.)

The majority opinion recognizes that Bright, Williams, and O'Connell do not stand in Locks' shoes, but the opinion nevertheless forces the trio in Locks' stance on the theory that a disposition of their case by the court will have an impact on Locks' pending court martial.

I am unaware of any principle of law to support the theory that a federal court should or can decline to exercise jurisdiction, otherwise appropriately invoked, because a judgment for or against the federal plaintiff, as a matter of *stare decisis,* may affect the disposition of a third person's case, wherever that case may be pending.

There is nothing in the record before us suggesting that there is any privity between or among the appellants. Joinder of two or more plaintiffs in the prosecution of their several claims against the same defendant challenging the constitutionality of the same regulation does not make the plaintiffs members of a single class. Locks would not be bound by any aspect of *res judicata* by any judgment rendered for or against his coappellants. The fact that the appellee Laird would be bound by any judgment rendered against him in the Bright, Williams, and O'Connell cases has no collateral estoppel effect on Locks' case, unless we are prepared to say that mutuality of estoppel is now abandoned in military courts, a proposition none of the parties has urged and for which no authority has been discovered.

A holding by the Supreme Court dismissing the indictment of a criminal appellant on the ground that

the federal statute under which he was prosecuted is unconstitutional not only frees that appellant, but also has the effect of freeing every other defendant whose prosecution under the same statute is pending. But it would be entirely incorrect to describe the Court's mandate in the first case as an injunction issued to restrain prosecution of the other cases. That same situation exists in the case at bench; therefore, *Younger v. Harris* (1971) .....U.S..... is irrelevant.

We are thus presented with the question whether or not declaratory and injunctive relief is appropriate to prevent threatened violation of the appellants' First Amendment rights when their sole alternative is to violate the regulation and risk criminal prosecution. I think that it is. (*E.g., Oney v. Oklahoma City* (10th Cir. 1941) 120 F.2d 861.)

I turn to the merits. The regulation challenged by appellants provides as follows:

> "Recent developments have established a need for clarification of the circumstances in which Air Force members are not permitted to wear their uniform. Accordingly, pursuant to para 1-10d, AMF 35-10, 26 June 1968, the Secretary of the Air Force has specified that Air Force members will not wear the uniform at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting, demonstration, or interview is the advocacy, expression, or approval of opposition to the employment or use of the Armed Forces of the United States."

The regulation does not prohibit wearing the uniform to any public meetings at which the employment

of the Armed Forces is a discussion topic. It does not prohibit wearing uniforms to all public meetings. It prohibits wearing uniforms only to those meetings in which there may be criticism of the use to which the Armed Forces are put. Thus the uniform can be worn to a meeting held in praise of the use of our Armed Forces in Vietnam. But a member of the Air Force who wears the uniform to a meeting in which the topic may be criticism of the use of our Armed Forces in Vietnam is subject to court martial. The regulation is patently unconstitutional.

> "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Virginia Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 642.)

In *Schacht v. United States* (1970) .....U.S..... (26 L. Ed. 2d 44) the Court unanimously struck down a similar law that prohibited the wearing of the uniform of the Armed Forces in a theatrical production in which the portrayal tended "to discredit that armed force." (10 U.S.C. § 772(f).) "The final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment." (26 L. Ed. 2d at 48.) The rationale of *Schacht* controls this case.

I would affirm the judgment as to Locks and reverse as to Bright, Williams, and O'Connell with directions to issue the relief prayed for.

Appendix B

United States District Court
For the Northern District of California

Civil No. 51076

Michael R. Locks, et al.,
Plaintiffs and Petitioners,
vs.
Melvin Laird, as U. S. Secretary of Defense, et al.,
Defendants and Respondents.

ORDER DISMISSING COMPLAINT AND DENYING PETITION

On or about October 10, 1968, the then Secretary of the Air Force issued a general order which reads:

> "Recent developments have established a need for clarification of the circumstances in which Air Force members are not permitted to wear their uniform. Accordingly, pursuant to para 1-10d, AFM 35-10, 26 June 1968,[1] the Secretary of

[1] AFM 35-10, Paragraph 1-10 provides:
When Wear of the Uniform is Prohibited. Air Force members will not wear the uniform:
a. At any meeting or demonstration that is a function of, or sponsored by any organization, association, movement, group, or combination of persons that:
(1) The Attorney General of the United States has designated as totalitarian, Fascist, Communist, or subversive.

> the Air Force has specified that *Air Force members will not wear the uniform at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting, demonstration, or interview is the advocacy, expression or approval of opposition to the employment or use of the Armed Forces of the United States.* (Emphasis added)

Petitioner Locks, after court-martial proceedings, was convicted on two specifications of violation of Article 92 of the Uniform Code of Military Justice for failing to obey the above stated general order or regulation. This conviction is under military appellate review. Pending review of the record of trial, petitioner was ordered to be confined at the United States Air Force Retraining Center at Lowry Air Force Base, Colorado.

Since the issue raised by petitioner Locks in the instant case is the same issue that will be dealt with by the military appellate review,[2] this court should not interfere with such military judicial process. "The military constitutes a specialized community governed

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(2) Advocates or approves the commission of acts of force or violence to deny others their rights under the Constitution of the United States.

(3) Seeks to alter the form of the United States Government by unconstitutional means.

b. During or in connection with the furtherance of private employment or commercial interests when an inference of official sponsorship for the activity or interest would be drawn.

c. Under circumstances which would bring discredit upon the Armed Forces.

d. Under any other circumstances that Secretary of the Air Forces specifies and publishes.

[2]Petitioner has yet to exhaust his military judicial remedies before the Board of Review of the Air Force and Court of Military Appeals, if this latter court accepts his appeal.

by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff v. Willoughby,* 345 U.S. 83, 94 (1953). The very matter which brought petitioner Locks before the court-martial and for which he has a pending appeal is the very matter governed by the regulation here in question, hence we do *not* have "a situation in which the defense of the State's [here the military's] criminal prosecution will not assure adequate vindication of constitutional rights." *Dombrowski v. Pfister,* 380 U.S. 479, 485 (1965). Under such circumstances *Dombrowski* is not applicable. The controlling cases here are *Gusik v. Schilder,* 340 U.S. 128 (1950), and *Noyd v. McNamara,* 378 F. 2d 538 (10th Cir. 1967) *cert. denied,* 389 U.S. 1022 (1967). These controlling cases dictate that this court is without jurisdiction as to petitioner Locks and as to him the complaint for injunction and declaratory relief and the petition for writ of habeas corpus are dismissed.[3]

The remaining petitioners (plaintiffs) in this case —Bright, Williams and O'Connell—are members of the United States Air Force Reserve presently serving on extended active duty and currently stationed at Hamilton Air Force Base, California. They are not under physical restraint in any form and seek to enter this "controversy" on the allegation that they "desire and intend to participate in a similar demonstration

[3]For a case in accord in this district, see Locks v. Commanding General, Sixth Army, Civ. No. 50101 (Oct. 9, 1968).

[similar to the one petitioner Locks attended in uniform and for which he was convicted in court-martial proceedings] to be held off the Air Force Base on May 30, 1969, and that but for the regulation in question and the punishment being suffered by plaintiff Locks they would do so and wear their uniforms as an expression of their First Amendment freedoms."

These three petitioners contend that the regulation is "unconstitutional, vague, overboard and discriminatory on its face." With this contention this court cannot and does not agree.

It was stipulated at the Court hearing on the order to show cause that *the purpose of the demonstration* of May 30, 1969, *is the advocacy, expression or approval of opposition to the employment and use of the Armed Forces of the United States in Vietnam*; that petitioners desire and intend to wear their Air Force uniforms at said demonstration; and that petitioners can reasonably expect that the regulation (general order) will be enforced against them if they wilfully violate the same. This stipulation adequately presents a "controversy" for the consideration of the court.[4]

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[4]This controversy is sufficient to invoke jurisdiction under 28 U.S.C. § 1331. The government in its motion to dismiss has not challenged the adequacy of the allegation of jurisdictional amount. The relief granted herein is authorized by 28 U.S.C. § 2201. Any lingering questions as to jurisdiction in this type of case seem to have been laid to rest by the Supreme Court in *Oestereich v. Local Board No. 11*, 393 U.S. 233 (1968), where the Court did not hesitate to take jurisdiction, although without indicating its basis for so doing. *Cf. Oestereich v. Local Board No. 11*, 280 F. Supp. 78 (D. Wyo. 1968) (dismissed, inter alia, for lack of jurisdiction).

Alternatively, the burden alleged by petitioners as a consequence of the Air Force order is sufficient to invoke habeas corpus jurisdiction, 28 U.S.C. § 2241. See *Carafas v. LaVallee*, 391 U.S. 234 (1968).

There is no constitutional right of a member of the Air Force to wear his uniform when and wherever he pleases. There can be no doubt that the Air Force may by proper orders regulate the use of the Air Force uniform by which individuals wearing that uniform are identified with the Air Force.

But, petitioners contend, conceding the above to be true, the regulation in question is not a "proper" regulation since, as they allege, enforcement thereof violates their assured freedom of speech.

The petitioners' claim rests on the fundamental proposition that the display of symbols can be "speech" which enjoys First Amendment protection. It has long been established that the display of unofficial symbols is protected by the First Amendment, *Stromberg v. California,* 283 U.S. 359 (1931); *Tinker v. Community School District,* .....U.S..... (no. 21, O.T. 1968, decided February 24, 1969), and that freedom from coerced acceptance of official symbols in violation of religious scruples is also protected by the First Amendment, *Board of Education v. Barnette,* 319 U.S. 624 (1943).

The power and universality of symbolic forms of communication was recognized by the Supreme Court in *Board of Education v. Barnette, supra,* at 632-33:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or de-

> sign. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

The key that unlocks the present dispute is the understanding that there is no necessary relationship between the symbol and that which is symbolized.[5] A common example of this fact is that a "v" formed with the forefinger and middle finger is today a symbol for peace, whereas twenty-five years ago it was a symbol for victory in war. The point is that a symbol takes on an *assigned relationship* to the thing symbolized based primarily on the context of its use.

A military uniform is a symbol, and the issue in this case is whether it may be used in a context expressly contrary to the purposes and values intended by the Secretary of the Air Force. This court holds that if the Secretary of the Air Force commands that the uniform not be worn at events of the nature in question, the First Amendment does not command otherwise. To permit members of the military to display at will the primary symbol of their military service

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[5]S. I. Hayakawa, Language in Thought and Action 27 (1964).

would be to permit the destruction of the very symbolic effectiveness which the uniform is intended to enjoy.[6] This court does not find it violative of the First Amendment for the Secretary to limit the wearing of the uniform to contexts that wil' promote a sense, not just of membership in the Air Force, but of participation, allegiance, and achievement. The Air Force designs and furnishes the uniform according to its own criteria; the First Amendment does not forbid the Air Force from determining the uniform's *use* according to its own criteria.

This court is mindful that each petitioner took an oath in which he declared: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same, and *that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations* of the Uniform Code of Military Justice. So help me God." (Emphasis added).

The general order (or regulation) here in question is an order of the President of the United States and

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[6]The power with which a uniform can symbolize the values of patriotism and military prowess was exemplified in France prior to World War I. For almost a century the French army had sported blue coats, a red kepi, and red trousers. As developments in technology enable rifles to fire over greater distances, the need to escape visual detection increased. Efforts to change the uniform to a duller tone than red, however, were defeated by the assertion that "Le pantalon rouge c'est la France." Barbara W. Tuchman, The Guns of August 37-38 (1962). This court cannot say that the First Amendment deprives the military of authority to determine the circumstances in which such symbolic power is either generated or dissipated.

the officers appointed over petitioners according to regulations.

Petitioners overlook the fact that Armed Forces are mobilized for *employment and use wherever the national interests require their employment and use;* that such employment and use is the very purpose their presence in the Armed Forces is intended to serve; that while wearing the uniform of the Air Force they are subject to the commands of the President of the United States and the officers appointed over them; and that to effectively accomplish these objectives as members of the Armed Forces they can and should be subject to such restrictions as are reasonably necessary under the circumstances.

Here in considering the status of petitioners as members of the Air Force and the fact that they are subject to employment and use by the President pursuant to his constitutional authority, the time and circumstances which prompted the regulation may not be ignored.

Were we at peace and not engaged in a "war" in Southeast Asia[7] time and circumstances might cause us to seriously question the constitutionality of the regulation under review. But at a time of national emergency in which the nation is engaged in one of the costliest wars of our history in the number of lives

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[7]While there is a considerable body of opinion that questions the legality of our actions in Vietnam and thus questions the constitutional authority of the President to employ and use the Armed Forces in the "war" in Vietnam, the Courts have consistently refused to entertain the question. See *Mitchell v. United States,* 369 F. 2d 323 (2d Cir. 1966) *cert. denied* 386 U.S. 972, *rehearing denied* at 1042 (1967).

lost, casualties otherwise sustained and resources expended, attendance *in uniform* at a *demonstration clearly and directly aimed against the very purposes for which our Armed Forces are to be employed and used* runs counter to the oath each petitioner took and constitutes such a flouting of elemental loyalty to the President and the officers appointed over petitioners that it cannot help but have *some* adverse and detrimental effect on the loyalty, discipline, morale and efficiency of the Armed Forces. To conclude that such activity or symbolic speech could not have such adverse effect is unreasonable. The extent of such adverse effect this court need not decide, once it determines, as it does, that *some* adverse effect could be reasonably expected to follow. The basic responsibility of determining what constitutes "for the good of the service" when it involves assigning significance to military symbols, is more a military decision than it is a judicial one and hence should be approached by the courts with caution.

"Military regulations must be considered in the light of military exigencies, 'must be geared to meet the imperative needs of mobilization and national vigilance . . .' and great and wide discretion exists in the executive department both in the formation and application of regulations and in their interpretation in such matters as what constitutes 'for the good of the service'." *Noyd v. McNamara, supra* at 540.

To ensure against arbitrary action of the state, a free society values robust, vigorous and essentially unlimited public speech and discussion by citizens and

protects their right to do so by peaceful demonstrations. But when the *purpose and very objective* of the demonstration *is opposition to the employment and use of the Air Force in Southeast Asia* and when symbolic speech at such demonstration by wearing the uniform of the Air Force will tend to destroy military values through the misuse of the most universal and powerful symbol of those values and thereby adversely affect its effort to fulfill its primary purpose, the employment and use of its personnel in Southeast Asia, a general order or regulation issued to avoid or diminish the danger of such consequences to the Air Force is not only reasonable but imperative.

What this court decides today applies to the Air Force's determination as to the use of its own symbols. Because of the unique situation here involved, this court finds that the regulation, even though restricting only opposition to the use of the United States Armed Forces, is not violative of the First Amendment's ban on selective suppression of expression, *Cox v. Louisiana,* 377 U.S. 288 (1965), and on coerced prescription of political orthodoxy, *Board of Education v. Barnette, supra* at 642. As noted above, exclusion of the uniform from the activity here proscribed is essential to the preservation of the symbolic significance of the uniform. This court therefore finds that the regulation is drawn with the requisite degree of precision and that there is no violation of the doctrine of overbreadth, which the United States Supreme Court has made applicable to cases of this type involving a conflict between the war power and the First Amendment,

United States v. Robel, 389 U.S. 258, 262-268, 268 n.20 (1967). The regulation does not circumscribe oral or written speech. The regulation does not prohibit attendance or participation by members of the Air Force in meetings, demonstrations or interviews of the type here in question. Finally, wearing the uniform is prohibited only if there is reason to know the nature of the event in question.

The complaint and petitions are denied, the order to show cause is discharged and the proceedings are in all respects dismissed as to all parties in their capacities as plaintiffs and as petitioners.

Dated: May 23, 1969.

Alfonso J. Zirpoli
United States District Judge

Original Filed May 23, 1969,
Clerk, U. S. District Court, San Francisco.

United States District Court
For the Northern District of California

Civil No. 51076

Michael R. Locks, et al.,
Plaintiffs and Petitioners,
vs.
Melvin Laird, as U. S. Secretary of Defense, et al.,
Defendants and Respondents.

ORDER AMENDING ORDER OF MAY 23, 1969

It appears that in *Oestereich v. Selective Service Board,* 393 U. S. 223 at page 239, the Supreme Court remanded the case to the District Court:

> ". . . where petitioner must have the opportunity . . . to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. § 1331."

Now, Therefore, It Is Ordered that the first paragraph of footnote 4 on page 4 of the court's order dismissing complaint and denying petition of May 23, 1969, be and the same is hereby stricken.

It Is Further Ordered that the remaining paragraph read as follows:

> "The burden alleged by petitioners as a consequence of the Air Force order is sufficient to

invoke habeas corpus jurisdiction, 28 U.S.C. § 2241 et seq. Orloff v. Willoughby, 354 U.S. 83 (1953); Goldstein v. Clifford, 290 F. Supp. 275 (D. N.J. (1968); *see also* Carafas v. Lavallee, 391 U.S. 234, 237 (1968) (writ issues to cure political disabilities); Jones v. Cunningham, 371 U.S. 236 (1963): The Great Writ is not a 'static, narrow, formalistic remedy,' *id.* at 243. The Writ protects against restraints on a man's liberty, 'restraints not shared by the public generally . . .,' *id.* at 240."

Dated: May 28, 1969.

Alfonso J. Zirpoli
United States District Judge

Original Filed May 28, 1969,
Clerk, U. S. District Court, San Francisco.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-240

JOHN R. BRIGHT, ET AL., PETITIONERS

v.

MELVIN R. LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, members of the United States Air Force Reserve serving on active duty (R. 2) [1], brought this action in the United States District Court for the Northern District of California, seeking an injunction against the enforcement of a general order of the Air Force prohibiting the wearing of Air Force uniforms in public under certain circumstances [2] and a declara-

[1] "R." refers to the record before the court of appeals.

[2] The order, issued in October 1968 by the Secretary of the Air Force, provides:

"Recent developments have established a need for clarification of the circumstances in which Air Force members are not permitted to wear their uniform. Accordingly, pursuant to para 1-10d, AFM 35-10, 26 June 1968, the Secretary of the Air

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tory judgment that the order is unconstitutional on its face (R. 1–8).

Petitioners alleged in their complaint that they and others similarly situated had planned on attending various demonstrations in uniform, but had been deterred from doing so by the challenged regulation (R. 5). Joining petitioners as a plaintiff below was reservist Michael Locks, who had attended one of the demonstrations in uniform and had been convicted by a general court martial for violating the regulation (R. 2). Locks, whose military appeal from the conviction is pending (R. 3–4; Pet. App. ii), did not join in this petition for a writ of certiorari.

The district court held that petitioners had stated a "controversy" [3] and thus were entitled to an adjudication of their claims, but denied relief on the merits (Pet. App. xi–xix).[4] The court of appeals affirmed

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Force has specified that Air Force members will not wear the uniform at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting, demonstration, or interview is the advocacy, expression or approval of opposition to the employment or use of the Armed Forces of the United States."

[3] The court dismissed the complaint as to Locks on the grounds that his challenge to the regulation was the subject of a military appeal from his court martial conviction (Pet. App. x–xi).

[4] In an order amending its initial opinion, the district court held that it had jurisdiction of the case under 28 U.S.C. 2241 (Pet. App. xx–xxi). But as petitioners are not in custody for having violated the regulation and are not seeking discharge from the Air Force, there would appear to be no basis for invoking the habeas corpus jurisdictional statute. As the only other basis for jurisdiction is 28 U.S.C. 1331 (federal question jurisdiction) and as petitioners have only alleged but

without reaching the merits on the grounds that petitioners had failed to show that they were being irreparably harmed by the existence of the regulation, that the regulation was promulgated in bad faith or that resort to the military judicial system will be futile (Pet. App. v). One judge dissented, reaching the merits and expressing the view that the regulation was unconstitutional under *Schacht* v. *United States*, 398 U.S. 58.

2. The decision of the court of appeals is correct and conflicts with no decision of this Court or any other court of appeals. Accordingly, review by this Court is unwarranted.

As a general rule, "equity will not interfere with the criminal processes, by entertaining actions for injunction or declaratory relief in advance of criminal prosecution." *Zemel* v. *Rusk*, 381 U.S. 1, 19. While this Court has sometimes denied such extraordinary relief on the ground that no "case or controversy" had been made out (*International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222; see *Zemel* v. *Rusk*, *supra*, 381 U.S. at 19–20), relief may also be denied in causes involving a "case or controversy." See Younger →

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have not shown that the amount in controversy exceeds $10,000 (R. 2), the case should be remanded to the district court for proof of the $10,000 allegation in the event the Court concludes that petitioners are otherwise entitled to maintain the action. See *Oestereich* v. *Selective Service Board*, 393 U.S. 223, 239; see also our brief on the merits in *Fein* v. *Selective Service System Local Board No. 7*, No. 70–58, pp. 56–61. We are providing petitioners' counsel with a copy of this brief.

er v. *Harris,* 401 U.S. 37, 52–53. That the courts are not compelled by the Declaratory Judgment Act, 28 U.S.C. 2201, to "declare the rights and other legal relations" of a party in every actual controversy is clear. See *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 241. Thus, even assuming petitioners have made out a "controversy" in the instant case by alleging that they would have been prosecuted under the Air Force uniform regulation had they attended certain public demonstrations, compare *United Public Workers* v. *Mitchell,* 330 U.S. 75, that factor alone would not entitle them to relief. As petitioners have not pointed to any other extraordinary factors which might warrant intervention, their complaint must fail.

Apart from the general reluctance to interfere with criminal processes, there is another compelling factor which mandates against permitting petitioners to challenge the Air Force regulation in this case. Although this case does not involve the principles of federalism which underlie this Court's delimitation in *Younger* v. *Harris, supra,* and *Samuels* v. *Mackell,* 401 U.S. 66, of the circumstances under which federal courts may interfere with state proceedings, analogous considerations have led the Court to refrain from interfering prematurely with matters within the competence of the military judicial system. See *Noyd* v. *Boyd,* 395 U.S. 683, 694; cf. *Beard* v. *Stahr,* 370 U.S. 41; *Gusik* v. *Schilder,* 340 U.S. 128, 131–132. See our brief on the merits in *Parisi* v. *Davidson,* No. 70–91,

pp. 11–17.[5] As there has been no claim that the Air Force is enforcing its uniform regulation in bad faith (cf. *Cameron* v. *Johnson*, 390 U.S. 611), and as the military courts are fully empowered to consider any constitutional claims raised as defenses to prosecutions brought under that regulation (see *Burns* v. *Wilson*, 346 U.S. 137, 142), the granting of injunctive or declaratory relief by the federal courts in this case would unduly interfere with the administration of military justice. This conclusion is particularly justified where, as here, the very constitutional claims[6] asserted are presently under consideration by a military appellate court (see p. 2, *supra*).

3. Petitioners' reliance on *Wisconsin* v. *Constantineau*, 400 U.S. 433, for the proposition that restraint from interfering with military justice is inappropriate here is unfounded. In that case, a local police chief, pursuant to a state statute, had caused notices to be posted in public impugning Constantineau's good name and reputation without notice or an opportunity to be heard. Under such circumstances, federal judicial intervention was deemed appropriate. Here, no action whatsoever has been taken against petitioners.

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[5] We are supplying petitioners' counsel with a copy of this brief.

[6] While we do not deem it necessary to discuss the merits of petitioners' claims in this opposition, we note that those claims present novel questions concerning the power of the military to control the circumstances under which military personnel may appear in public in uniform. In this light, *Schacht* v. *United States*, *supra*—dealing with the wearing of military uniforms by non-military personnel in theatrical productions—is not controlling.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971